Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1444

FRANCES LETO ZANGRILLO,

Petitioner,

against

GORDON M. AMBACH, as Commissioner of Education of the State of New York, and the President and Board of Trustees of FASHION INSTITUTE OF TECHNOLOGY,

Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Jurisdiction

The petitioner asserts as a basis for jurisdiction 28 U.S.C. Section 1257(3), based upon an alleged violation of petitioner's due process rights under the Fourteenth Amendment to the United States Constitution.

Questions Presented

This petition for certiorari from a determination of the New York Court of Appeals denying petitioner's motion for leave to appeal and holding, in effect, that respondents did not violate any constitutional or statutory right of petitioner presents the following questions:

1. Whether this Court should entertain this petition where the New York Court of Appeals rendered its decision against petitioner on an adequate and independent state ground under the New York Education Law?

2. Whether this Court should entertain this petition where petitioner failed to raise any federal question in the state court of original jurisdiction below.

Statement of the Case

Respondent Fashion Institute of Technology ("FIT" or the "College") is a world renowned institution of higher learning offering associate and baccalaureate degrees in, *inter alia,* the fashion trades.* Petitioner is a member of the faculty of FIT.

Petitioner was hired by FIT as an instructor-technologist in 1956 and was promoted to the rank of instructor in 1962. She continued to work as an instructor until February 1, 1963 when she requested and was granted a one-

* On April 21, 1944, the Educational Foundation for the Apparel Industry, an educational corporation, was granted an Absolute Charter by the Regents of the State University of New York for the purpose of establishing the Fashion Institute of Technology.

year maternity leave of absence. In January, 1964, petitioner requested and received a one-year extension of her maternity leave, the maximum time allowable for any leave under FIT's bylaws then in effect, to and including January 31, 1965. After the expiration of her extended maternity leave, petitioner voluntarily elected not to return to her teaching duties at the College. Having failed to return in timely fashion from an approved leave of absence, petitioner was deemed to have resigned from the College's faculty.

The College's bylaws that were in effect at the time she requested the extension of her original maternity leave provided as follows:

> "Faculty members who resign shall be eligible for reinstatement in the same rank within ten years and reemployment by the President *within his discretion.*" (Emphasis added).

Petitioner first returned to teach at the College in September, 1967, nearly four years after she commenced her maternity leave and more than two and one-half years after the expiration of the leave. She was hired as a part-time faculty member without tenure to teach a single course for three hours per week for the fall semester only.

Petitioner returned to teach on a full-time basis in February, 1973 when the College's President, Marvin J. Feldman, exercising the discretion vested in him by the bylaws reinstated her with tenure. More than eight months later, she filed a grievance under the collective bargaining agreement between FIT and the United Federation of College Teachers in which she protested the loss of her tenure rights

and alleged that she had been placed on the wrong step of the salary scale for assistant professor when she was reinstated in 1973. After four days of hearings, Arbitrator Stephen J. Goldsmith denied the grievance in all respects. Petitioner never moved in the New York State Supreme Court to vacate or set aside the Arbitrator's adverse award.

Instead, on May 4, 1977, petitioner commenced an appeal to respondent Commissioner of Education of the State of New York. By Decision dated September 28, 1977, the Commissioner dismissed the appeal in all respects (10a).* The Commissioner concluded that New York Education Law Section 310(7) conferred jurisdiction upon him to hear only those controversies pertaining to schools within the "common school system" of the State of New York. Since FIT was a community college governed by its own board of trustees and operated under the auspices of the Board of Trustees of the State University of New York, he held that FIT was not a part of the common school system as defined by New York statutory and case law and, therefore, he lacked subject matter jurisdiction to decide the controversy.

On December 29, 1977, petitioner commenced a proceeding pursuant to Article 78 of the New York Civil Practice Law and Rules in the Supreme Court, Special Term, Albany County to review the Commissioner's decision. By decision dated March 3, 1978, Justice John T. Casey affirmed the Commissioner's determination and directed entry of judgment dismissing petition to review. Justice Casey held that the Commissioner was neither arbitrary nor capricious in determining that he had no subject matter jurisdiction

* References are to pages of petitioner's appendices.

under Education Law Sections 310 or 2587. Petitioner's moving papers in the Article 78 proceeding alleged no violation of any provision of the United States Constitution. To the contrary, she alleged only that the Commissioner misinterpreted the relevant provisions of the New York Education Law. On March 10, 1978, judgment was entered dismissing the petition (4a-6a).

Petitioner then appealed the judgment to the Appellate Division of the New York State Supreme Court, Third Judicial Department. The Appellate Division unanimously affirmed the judgment of the Supreme Court, Special Term, without opinion, and with costs to the respondents.

Petitioner moved for leave to appeal to the New York Court of Appeals pursuant to New York Civil Practice Law and Rules, Section 5602. On December 17, 1979, the New York Court of Appeals denied the motion for leave to appeal with costs to respondents. The order of the Court of Appeals was entered on December 17, 1979.

Reasons for Denial of the Petition

POINT I

The judgment of the New York Court of Appeals rests upon an independent and adequate state ground.

The fundamental issue pressed by petitioner in the courts below involved the interpretation and judicial construction of Sections 310 and 2587(9) of the New York State Education Law. Section 310 of the Education Law confers jurisdiction upon the Commissioner of Education to entertain and determine appeals by a party conceiving himself aggrieved by an official act or decision of any official or school authority within New York State's common school system. Section 2587(9) provides for an appeal to the Commissioner by a person granted tenure when charges have been filed against such person in accordance with the procedures set forth therein *and* the Board of Trustees of FIT has imposed a penalty or punishment against the aggrieved person. The decision of the Commissioner that he lacked jurisdiction to hear petitioner's appeal under either section of the Education Law was premised solely upon his interpretation of state law. The Commissioner's determination confining his jurisdiction to matters within the common school system was subsequently upheld by Justice Casey in the Supreme Court, Special Term, Albany County, the court of original jurisdiction, and the two appellate courts which reviewed Special Term's judgment on appeal.

This Court has consistently adhered to the self-imposed principle that it will not review a state court judgment based

upon an adequate and independent nonfederal or state ground. *Murdock* v. *Memphis,* 20 Wall. 590, 636 (1874); *Berea College* v. *Kentucky,* 211 U.S. 45, 53 (1908); *Fox Film Corp.* v. *Muller,* 296 U.S. 207 (1935); *Enterprise Irrigation District* v. *Farmers Mutual Canal Co.,* 243 U.S. 157 (1917); *Jankovich* v. *Indiana Toll Road Commission,* 379 U.S. 487 (1965); R. Stern & E. Gressman, Supreme Court Practice §§3.31, 3.32 at 230-233 (5th ed. 1978).

Perusal of the judgments below and Justice Casey's decision foreclose any argument that the judgment petitioner asks this Court to review was based upon a ground other than a nonfederal ground. In fact, as we show more fully below, petitioner never did assert a federal claim in the court of original jurisdiction. The judgment sought to be reviewed rests squarely on statutory construction of the Education Law and is supported by well established decisional law holding that the Commissioner's jurisdiction is limited to disputes that pertain to common school matters. *Bowen* v. *Allen,* 17 A.D. 2d 12, *aff'd w/o opinion,* 13 N.Y. 2d 663 (1963); *Pallilo* v. *Nyquist,* 63 Misc. 2d 912 (Sup. Ct. Albany Co. 1970); *Matter of Cleveland Mack* 11 Ed. Dept. Rep. 123 (1971); *Matter of Roode,* 9 Ed. Dept. Rep. 65 (1967). In reality, petitioner is asking this Court to construe the Education Law contrary to the construction given to it by the New York Court of Appeals. However, established Supreme Court precedent makes it clear that it is not the function of this Court to construe a state statute contrary to the construction given it by the highest court of a state. *Landmark Communication, Inc.* v. *Virginia,* 435 U.S. 829, 837 Fn. 9 (1978); *O'Brien* v. *Skinner,* 414 U.S. 524, 531 (1974).

Even assuming, arguendo, that the issue goes beyond a mere disagreement over statutory construction and petitioner did raise a federal question in the courts below, the fact that the Court of Appeals judgment rests on an unambiguous, adequate and independent State ground precludes further review by this Court. *Zacchini* v. *Scripps-Howard Broadcasting Co.*, 433 U.S. 562 (1977); *Wilson* v. *Loew's, Inc.*, 355 U.S. 597 (1958); *Herb* v. *Pitcairn*, 324 U.S. 117 (1945).

The rationale for the Court's declination of jurisdiction where an adequate state ground exists is succinctly set forth in *Herb* v. *Pitcairn, supra* at 125-126:

> "The reason is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power between the state and Federal judicial systems and in the limitations of our own jurisdiction. Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of Federal laws, our review could amount to nothing more than an advisory opinion."

It is apparent that petitioner elected to bring her claim in the wrong forum. Nevertheless, a state court decision that a party has elected the wrong choice of forum or remedy constitutes an adequate state ground for a judgment that necessarily precludes Supreme Court review of a federal question. *Edelman* v. *California*, 344 U.S. 357 (1953); *Parker* v. *Illinois*, 333 U.S. 571 (1948); *Copperweld*

Steel Company v. *Industrial Commission of Ohio*, 324 U.S. 780 (1945), *Herb* v. *Pitcairn*, 324 U.S. 117 (1945); *McQuade* v. *Inhabitants of Trenton*, 172 U.S. 636 (1899); *Farson, Son & Company* v. *Bird*, 248 U.S. 268 (1919). Consequently, this Court has no jurisdiction to consider the alleged federal question that petitioner attempts to raise.

Petitioner's assertion that she was compelled to bring an appeal to the Commissioner before pursuing her alleged federal claim in the State Supreme Court or the United States District Court simply cannot withstand scrutiny. Petitioner had several options available to her which she failed inexplicably to exercise. For example, she could have moved in the State or Federal courts to vacate or set aside the arbitration award which explicitly rejected her claims that FIT abridged her tenure rights. Second, she could have pursued her claims under 42 U.S.C. §1983 either in State Court or in the appropriate United States District Court. Finally, she could have commenced a special proceeding pursuant to Article 78 of the Civil Practice Law and Rules to review FIT's refusal to reemploy her in 1968. All of these possible avenues to adjudicate whatever rights she might have had are now time-barred.

POINT II

Petitioner failed to present a federal question in the trial court and in the instant petition.

a. The petition does not present a federal question.

This Court's power to review final judgments rendered by the highest court of a state by way of a writ of certiorari is circumscribed by 28 U.S.C. 1257(3). Petitioner does not question the validity of a treaty or statute of the United States. Nor does the petition assert that Education Law Sections 310 or 2587 are repugnant to the United States Constitution or treaties or statutes of the United States. Instead, petitioner asserts that this Court has jurisdiction under the third prong of 28 U.S.C. 1257 because she has been denied a property right without due process of law in violation of the Fourteenth Amendment to the Constitution. The due process claim is premised upon a mistaken belief that FIT violated her tenure rights when it declined to offer her full-time employment after she completed a one-semester assignment as a part-time faculty member in 1968.

It is axiomatic that petitioner must first show that she possessed a property right before she can claim a deprivation thereof. In fact, the record discloses that petitioner blithely ignores the fact that at the time the alleged due process violation took place, petitioner was an untenured teacher. Petitioner candidly admits in the petition (p. 3) that she "overstayed" her maternity leave. More significantly, she conceded at the arbitration proceeding and the Arbitrator found that:

> "Lapse or expiration of the maternity leave on or about February 1, 1965 is agreed by the parties to have constituted a (constructive) resignation".

Contrary to petitioner's belated contention that she was unlawfully deprived of her tenure rights, New York law makes it abundantly clear that the termination of the employment status of an individual who does not return from a leave of absence does not involve a violation of tenure rights. *Matter of Thomas* v. *Board of Education of Oceanside, UFSD,* 58 A.D. 2d 584 (2d Dept. 1977); *Matter of Fink,* 11 Ed. Dept. Rep. 67 (1971). Indeed, subdivision (1)(d) of Section 2587 defines "tenure" as the right to hold a position "during good behavior and efficient and competent service . . ." Clearly, the right to remain tenured does not survive interminably once an individual resigns from employment and thereby fails to render "efficient and competent service" to her employer. See *Doering* v. *Hinrichs,* 289 N.Y. 29 (1942); *Thomas* v. *Board of Education of Oceanside, UFSD, supra; Shapiro* v. *Board of Education of City of New York,* 248 A.D. 601 (2d Dept. 1936); *Winkel* v. *Teachers Retirement System of City of New York,* 149 N.Y.S. 2d 443 (Sup. Ct. Kings Co. 1956); *Walter* v. *Board of Education of Fallsburgh,* 25 Misc. 2d 616 (Sup. Ct. Spec. T. Sullivan Co. 1960). Having resigned her employment with FIT and lost whatever tenure she may have had, petitioner cannot now be heard to complain that she was deprived of due process of law since she had no tenure rights when she completed her part-time teaching assignment in 1968.

Moreover, petitioner's reliance upon the provisions of Education Law Section 2587(9) is misplaced. That section

provides for an appeal to the Commissioner only when a teacher is removed from tenured employment by FIT after charges have been brought and the Board of Trustees has held a hearing and fixed a penalty. It is clear that petitioner has never been dismissed, disciplined, penalized or denied tenure by FIT's Board of Trustees. Nor has FIT's President or Board of Trustees ever preferred charges against her to remove her from tenured employment. Indeed, the only minimal relevance Section 2587 has to Zangrillo's claims is based upon her assertion that FIT allegedly violated her "tenure rights" when it properly concluded that she had resigned, a fact which she concedes, and had removed herself from tenured employment when she failed to return to employment upon the expiration of her extended leave of absence on February 1, 1965.

In the absence of any federal question, the petition for a writ of certiorari to the Court of Appeals of New York should be denied.

b. Petitioner failed to follow the correct procedure under New York law for raising a federal question.

The petition should be denied for another equally compelling reason. Assuming, for the sake of argument, that the petition does present a federal question, the record is unequivocal that petitioner failed to follow New York procedural law by not raising the federal question at the appropriate stage of the state court proceedings below.

Examination of the moving papers in the Article 78 proceeding petitioner commenced in the State Supreme Court, Albany County, fails to disclose any mention of the

due process clause of the Fourteenth Amendment to the United States Constitution. Similarly, the instant petition does not affirmatively state that the constitutional arguments asserted therein were first made in the court of original jurisdiction. Perhaps aware of this fatal infirmity, petitioner admits in her Statement pursuant to Rule 23(f) of the Supreme Court Rules, that she considered the constitutional issues to be of "peripheral significance" (petition at p. 17) and that her argument focused upon the correct statutory construction to be given to Education Law Sections 310 and 2587. In fact, petitioner asserted no claim under the Fourteenth Amendment.*

The law in New York is well settled that an appellate court will not entertain a federal question that was not properly raised and presented in the trial court. *Hamilton Mutual Realty Fund* v. *Band Realty Co.*, 41 N.Y. 2d 939 (1977); *Brown* v. *Brown*, 34 A.D. 2d 727 (4th Dept. 1970); *Peasley* v. *Reid*, 57 A.D. 2d 998 (3rd Dept. 1977); *Purdy* v. *Erie Railroad Co.*, 162 N.Y. 42 (1900), *aff'd* 185 U.S. 148 (1902).

This Court has consistently held that it lacks jurisdiction to review a final judgment of the highest state court where no federal question was raised or specially set up at the trial court level as required by settled state practice.

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* Petitioner's fleeting reference to the "Civil Rights Law of 1964, decisional rulings and later enactments" in the moving papers in the initial appeal to the Commissioner is not sufficient to preserve the federal question for the Supreme Court's review. *Herndon* v. *Georgia*, 295 U.S. 441 (1935); *Bowe* v. *Scott*, 233 U.S. 658 (1914); *Harding* v. *Illinois*, 196 U.S. 78 (1904); R. Stern and E. Gressman, Supreme Court Practice §3.26 at p. 210. Even these legally insufficient statements were not asserted in the moving papers before the Supreme Court, Albany County.

Bowe v. *Scott,* 233 U.S. 658 (1914); *Purdy* v. *Erie Railroad Co.,* 185 U.S. 148 (1902); *Mutual Life Insurance Co.* v. *McGrew,* 188 U.S. 291 (1902); *F. G. Oxley Stove Co.* v. *Butler County,* 166 U.S. 183 (1897).

In *Purdy* v. *Erie Railroad Co., supra,* a case originating in New York, this Court commented upon the New York Court of Appeals' refusal to review a constitutional issue not hitherto presented to the trial court:

> "In so holding the court followed the settled rule of practice in that State. On that practice alone was based its refusal to consider a federal question not brought to the attention of the trial court." 185 U.S. at 153.

The Court concluded that petitioner's failure to comply with state procedural law was sufficient basis for declining to review the Court of Appeals' judgment:

> Now, where a party drawing in question in this court a state enactment as invalid under the Constitution of the United States, or asserting that the final judgement of the highest court of a state denied to him a right or immunity under the Constitution of the United States, did not raise such question or specially set up or claim such right or immunity in the trial court, this court cannot review such final judgment, and hold that the state enactment was unconstitutional, or that the right or immunity so claimed had been denied by the highest court of the state, if that court did nothing more than decline to pass upon the Federal question because not raised in the trial court as required by the state practice. 185 U.S. at 154.

From the foregoing, it is evident that petitioner may not attempt to raise the Fourteenth Amendment argument in this request for a writ of certiorari.

Conclusion

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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